

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEW JERSEY
3 CIVIL ACTION NO.97-cv-03496-DRD-JAD

4 WALSH SECURITIES, INC.,

MOTION FOR
RECONSIDERATION

5 vs.

6 CRISTO PROPERTY MANAGEMENT, LTD.,
7 et al.,

8 Defendants.

9 November 19, 2012
10 Newark, New Jersey

11 B E F O R E: HONORABLE DICKINSON R. DEBEVOISE, USDJ
12

13 Pursuant to Section 753 Title 28 United States Code, the
14 following transcript is certified to be an accurate record
15 as taken stenographically in the above-entitled
proceedings.

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1 THE COURT: We're ready to go ahead with Walsh
2 Securities against Cristo. Who's going to argue the motion
3 for clarification?

4 MR. STONE: Your Honor, David Stone from the firm of
5 Stone & Magnanini.

6 THE COURT: Speak into the microphone directly.

7 MR. STONE: I'll try.

8 THE COURT: If I look away from you, I'm just reading
9 you on the reader here.

10 MR. STONE: Okay. Your Honor, it's David Stone from
11 the firm of Stone & Magnanini for the plaintiff. We filed
12 the motion for clarification. Mr. Magnanini sends his
13 regrets. Unfortunately, as a result of the storm, he was
14 ordered to do court-ordered depositions today in Long
15 Island, so, I'm covering for him.

16 THE COURT: Well, tell him we missed him.

17 MR. STONE: So, I think it's important to understand
18 how we got to this point for this motion for clarification.
19 This is a motion to clarify the Court's August 10th, 2012
20 order, which dealt with a motion for reconsideration that
21 was filed by the defendants which covered the decision in
22 April of 2012, April 17th of the Court, that we could seek
23 damages under the -- for the loss of the merger agreement
24 that Walsh Securities had, so, that was the decision in
25 August 10, 2012. And that is the motion for clarification

1 that we filed here.

2 The reason we filed a motion for clarification, I
3 think it's important to understand this, the Court, in
4 April of 2012, entered a detailed opinion after extensive
5 briefing of the motions for summary judgment of the
6 parties.

7 On pages 34 and 35 of that opinion, the Court
8 dismissed our claim for bad faith against the insurance
9 companies. On pages 36 and 37, the Court went on to hold
10 that despite it had dismissed our bad-faith claims, that
11 under contract damages, we were entitled to seek both the
12 loss, the diminution in value of the company, Walsh
13 Securities, as a result of its inability to buy back the
14 loans as a result of the title company's refusing to pay on
15 the title closing letters and their title insurance on
16 several hundred properties. The Court found that was
17 foreseeable.

18 The Court noted that in New Jersey, citing Donovan
19 vs. Bachstadt, "Compensatory damages are designed to put
20 the injured party in as good a position as he would have
21 had if performance had been rendered as promised."

22 The Court went on to say, "Damages should be such as
23 may fairly be considered either arising naturally, i.e.,
24 according to the usual course of things from such breach of
25 contract itself or such as may reasonably supposed to have

1 been in the contemplation of both parties at the time they
2 made the contract as a probable result of the breach of
3 it."

4 So, the Court, citing this law for breach of
5 contract, not bad faith, for breach of contract, held that
6 the court must consider the damages flowing from the
7 breaches of these approximately 220 CPLs and title policies
8 at issue in this case.

9 It said, the Court held -- I'm sorry -- that "A jury
10 could reasonably find that the parties should have
11 reasonably contemplated that a fraudulent scheme affecting
12 hundreds of mortgage loans would give rise to substantial
13 losses and to the extent that WSI is entitled to coverage
14 under the CPLs and title policies for those losses, a jury
15 could reasonably find that the title insurance failure to
16 indemnify WSI would foreseeably hinder its ability to, one,
17 offset its losses and, two, repurchase the fraudulent
18 mortgage loans from the secondary market, thereby causing
19 WSI to be in a state of financial disarray and leading to
20 the breakdown of the merger between Walsh Holdings and
21 diminution of WSI's value."

22 So, as of April 17, 2012, the Court had held that we
23 could pursue both damages for the loss of the merger and
24 damages for diminution of value at pages 36 and 37 of its
25 opinion. That was after the Court dismissed our bad-faith

1 claims.

2 So, it was clear from the Court's opinion, and that's
3 law of the case, that we could pursue diminution in value.

4 Then the defendants at that point had an opportunity
5 to move for reconsideration. They elected only to move for
6 reconsideration on the issue of the merger, which they did.
7 They moved for reconsideration on the issue of the merger
8 and the Court granted that motion on the basis of standing,
9 that Walsh Securities did not have standing.

10 That did not in any way affect the Court's decision
11 that Walsh Securities could sue based on the foreseeable
12 fact that a jury could find that its diminution in value
13 was foreseeable. That motion for reconsideration did not
14 address that issue by the defendants. The Court did not
15 address that issue in its order.

16 So, as of August 10, 2012, as far as the plaintiffs
17 were concerned, we had an opinion of your Honor, law of the
18 case, we can pursue diminution in value. What happened
19 was --

20 THE COURT: Not the damages arising out of the failed
21 merger.

22 MR. STONE: Correct. And we understand that. But we
23 could use the fact that another company was willing to pay
24 us 400 million dollars to buy our company as some evidence
25 of the fact of what the value of our company was worth at

1 that time.

2 THE COURT: That's an evidential question we can
3 address later.

4 MR. STONE: Right, I agree with that. That's an
5 evidential question. But in any event, we agreed that we
6 could not pursue the loss of the merger.

7 The Court has always distinguished in its opinions,
8 the parties have always distinguished in their motions,
9 that there's two different things here. There's the loss
10 of the merger and then there's the loss of the value of the
11 company which occurred no matter whether there was a merger
12 or not.

13 I mean, the company had a value. It was an ongoing,
14 very successful company before all of this happened, and
15 now it's in bankruptcy. So, in any event, that was the law
16 of the case.

17 Now, when we came for our mediation settlement
18 conference before your Honor, it was our view that we had a
19 case that, based on your Honor's opinion, we had potential
20 damages of 440 million dollars, 400 million dollars for the
21 loss of diminution in value and somewhere between 20 and 40
22 million dollars, depending on how you do the math, for the
23 properties that we had to buy back and the damages that we
24 suffered as a result of that.

25 The defendants took the position in that conference

1 that we did not have a claim for the 400 million, and we
2 said to them, Well, we don't see where you're getting that
3 from. It was our understanding, and I think that's what
4 they said to us, and I think that's what we said to your
5 Honor in fact, was that they were saying that somehow your
6 August 10th, 2012 opinion on the merger had somehow
7 impacted your original decision in April that we could seek
8 diminution of value.

9 We said we don't see how that could be because you
10 didn't move on that issue. That issue wasn't briefed. You
11 didn't move for reconsideration on it. You moved only on
12 the standing issue relating to the merger.

13 So that's where we thought we were and we advised
14 your Honor of that, and there was a discussion about that,
15 and your Honor made the determination that we should move
16 for clarification on that issue, did your August 10th, 2012
17 opinion somehow modify your opinion in April of 2012, and
18 that's what we did.

19 We moved on that issue and that's what we said in our
20 brief and that's what we've said in our order and, in fact,
21 what we said was, at page five of our brief, we said,
22 "Plaintiff only seeks for the Court to clarify for the
23 title insurance defendants that the August 10th opinion and
24 order only covered the merger and damages" -- "merger
25 damages claimed, they moved on and did not impact

1 plaintiff's claim for damages from its diminution in
2 value." So, that was what we moved on and that's what we
3 understood the issue was.

4 In their opposition brief to our motion, somewhat
5 surprisingly to us, the defendants say on page two,
6 "Defendants agree that the August 10th opinion and order
7 addressed only WSI's request for the recovery of loss of
8 merger damages, finding that WSI lacks standing to seek
9 those damages."

10 Based on that statement, we win. We win our motion
11 for clarification because our motion for clarification was
12 only that that order in August -- on August 10, dealt only
13 with the merger, so, that should be the end of this, your
14 Honor, because that's the only motion that's in front of
15 you right now.

16 However, the defendants, in an attempt to essentially
17 reargue or attempt to argue late reconsideration of your --
18 excuse me -- of your April 17th order, are in opposition to
19 our motion for clarification. They go on to argue that
20 somehow in your April 17th order, you held that we could
21 not pursue diminution in value, even though you
22 specifically said that we could, and that's really what
23 their argument is.

24 Their argument is somehow that even though your
25 opinion just read, you know, practically the words that are

1 in the opinion says we can pursue diminution in value, that
2 it's an appropriate contract damage that's foreseeable,
3 that somehow, because two pages earlier you dismissed our
4 bad-faith claim, you were actually holding that we
5 couldn't.

6 Well, first of all, they're wrong. You know, your
7 Honor's opinion is accurate, correct, is appropriate under
8 the law of New Jersey but, more importantly, they don't
9 have standing to make that argument now. They had an
10 opportunity to make that motion for reconsideration. They
11 never made it. They made a motion on the merger.

12 They had that opportunity to make that argument in
13 their summary judgment motion papers. They never made it
14 in their summary judgment motion papers, your Honor. We
15 went over every single argument they made in those many
16 different --

17 THE COURT: They have new counsel now.

18 MR. STONE: Well, unfortunately, new counsel can't
19 come in and reargue all the decisions in the case, although
20 they may like to do it because they may not be happy with
21 those decisions. That isn't the law. Those aren't the
22 rules.

23 The rules are very clear, your decision is law of the
24 case and your decision is correct.

25 And I would point your Honor to the cases that we've

1 cited, in particular, the Vision Mortgage case and the
2 Sears case.

3 New Jersey has said that with the client protection
4 letters that were in place during this case and with the
5 title insurance policies that were in place, that title
6 insurance companies are going to be responsible for these
7 kind of damages. They're going to be responsible for
8 necessarily direct damages that occur as a result of their
9 failure to pay, and that's not under bad faith, your Honor.
10 Those cases aren't under bad faith. Those cases are cases
11 which simply say that as a contractual matter, they're
12 going to be obligated to do that.

13 They cited a bunch of cases about bad faith. They
14 cited a bunch of cases from outside of New Jersey which
15 have no relevance here but, moreover, they have no right to
16 be making any of these arguments because they don't have a
17 motion in front of your Honor and their time to make that
18 motion is long past.

19 So, for all of those reasons, we respectfully submit
20 your Honor should grant our motion for clarification.
21 Thank you.

22 THE COURT: All right. Thank you very much.
23 Defense.

24 MR. HAYES: Good morning, your Honor. Edward Hayes
25 representing Fidelity and Nations in this case. Your

1 Honor, we see this as relatively simple, also. We see this
2 as to whether or not consequential damages, not
3 compensatory damages which are provided for under a breach
4 of contract claim, but consequential damages can survive in
5 this case after your Honor's determination that there was
6 insufficient evidence to establish a bad-faith claim in
7 this case based on the ample evidence which existed of the
8 participation of the plaintiff in the case.

9 The pleadings in this case, your Honor, that the
10 plaintiff has filed, and the responses that it's filed to
11 the various motions in this case, all tie these diminution-
12 in-value damages, which are consequential damages, into one
13 thing, bad faith. They did not tie them into breach of
14 contract, we believe, because there's a recognition that
15 under New Jersey law, a breach of contract provides for
16 certain damages, the debt plus interest.

17 The Vision Mortgage case and the Sears case which Mr.
18 Stone cites didn't change that principle. It didn't change
19 the principle that you recover more than debt or interest.
20 It took away some of the defendants' -- the title
21 defendants' claims in those cases to limit those damages.

22 For example, in Vision, your Honor may recall one of
23 the defenses that was raised by the title company in that
24 case was that the loss that had been sustained in that case
25 was sustained because after the foreclosure, there was

1 still a debt due, and the argument that the title company
2 made was the fallacy of your loan here was the appraisal
3 that was done. You loaned too much money on a property
4 that didn't have sufficient value. And what the court in
5 Vision said -- it didn't say you're entitled to
6 consequential damages. What the court in Vision said,
7 you're liable for debt plus interest and you're not going
8 to be able to excuse your responsibility and liability
9 under a closing protection letter.

10 Every pleading in this case, Judge, talks about
11 diminution-in-value damages flowing from bad faith, flowing
12 from breach of good faith and fair dealing, which your
13 Honor dismissed in your April 2012 order.

14 We believed, your Honor, and we still believe today,
15 that when your Honor threw out the bad-faith claim, your
16 Honor threw out the only basis upon which consequential
17 damages could be recovered in this case.

18 While Mr. Stone talks about foreseeability,
19 foreseeability is the second prong, your Honor, that would
20 have to be established in order for recovery in this case
21 of consequential damages. The first prong is that it's an
22 element of damages recoverable under the cause of action
23 that's sought. If it is something which is recoverable,
24 then the plaintiff would have to prove foreseeability.

25 This is not a recoverable claim under New Jersey law

1 against a first-party insurance carrier absent a
2 determination of bad faith, and --

3 THE COURT: But I think Mr. Stone is objecting to the
4 timing of your raising this argument. This is water over
5 the dam and this was decided some months ago and you're
6 belatedly raising it now.

7 MR. HAYES: But with all due respect to Mr. Stone,
8 your Honor, my understanding of a reconsideration request
9 is to make sure that the proper issues are before the Court
10 for determination, to make sure there's not a manifest
11 injustice as a result of a decision issued by the Court.

12 We believe this is not a compensable element of
13 damages and whether we got it right before, Judge, or we're
14 getting it right now, the ultimate decision is one that we
15 believe you already made. There is no bad faith in this
16 case.

17 If there is no bad faith in this case, your Honor,
18 there can be no consequential damages. This relief that
19 they're asking for is an element of consequential damages
20 which no New Jersey court has recognized as a viable
21 recovery against an insurance company except, except when
22 there is bad faith.

23 So, our position, your Honor, is that when your Honor
24 dismissed the bad-faith claim, regardless of your
25 subsequent discussions in that case about merger and

1 diminution-in-value damages, when your Honor took bad faith
2 out, you cut the legs out from under the plaintiff on that
3 claim.

4 We don't believe we're rearguing or arguing new
5 issues here. We believe that what the plaintiff is
6 attempting to do is to get around controlling New Jersey
7 law which says those elements of damages are not
8 recoverable.

9 Our request, your Honor, is that you stand by the
10 decision that you made in April, at which time you ruled
11 that there was no bad faith, because unless there is some
12 case law cited by the plaintiffs, and there is none, in a
13 first-party context, absent the ability to establish a bad-
14 faith claim, consequential damages are not recoverable.

15 What they can recover, your Honor, is the loss under
16 the title policy, which is the debt plus the interest.
17 What they cannot do is bootstrap a consequential damage
18 claim into the case without bad faith.

19 When your Honor reviews their pleadings in this case,
20 your Honor will see bad faith was always the basis upon
21 which they were looking for consequential damages. So,
22 when we took the position that we did after your Honor's
23 decision that consequential damages were out of this case
24 and that the diminution in value was not recoverable, we
25 thought we had a legitimate and bona fide basis for it.

1 When we contested your Honor's decision on the
2 merger, we did so, your Honor, because we believed separate
3 and apart from the fact that consequential damages were not
4 recoverable, we had a separate basis upon which to point
5 out what we believe was an error in your Honor's prior
6 opinion, that is, the standing issue, and your Honor
7 obviously agreed with us in issuing that decision.

8 So, what we're asking this Court to do is not to put
9 the defendants in a position, Judge, where we're fighting a
10 claim that New Jersey law does not recognize. We're
11 prepared to fight with respect to compensatory damages and
12 raise all our defenses.

13 What we should not have to fight and what should not
14 be placed before a jury based on New Jersey law is the
15 diminution-in-value damages which are solely consequential.

16 So, we would respectfully request that your Honor
17 deny their request for clarification as there's simply no
18 basis for that recovery. Thank you, sir.

19 THE COURT: All right. Thank you very much. Mr.
20 Stone, do you want to reply? Excuse me. Yes, Mr. Kott, go
21 ahead.

22 MR. KOTT: Thank you, your Honor. David Kott,
23 K-o-t-t, McCarter & English, LLP, for the defendant
24 Commonwealth.

25 I want to respond to one of the Court's questions to

1 Mr. Hayes, and the question was, are you too late on a
2 motion for reconsideration? And the answer to that is no.

3 In fact, I would submit it's the plaintiff who is
4 seeking reconsideration and they're too late, and let me
5 explain what I mean by that, your Honor.

6 We did seek reconsideration of the loss of merger
7 damages. We did that because we thought the Court
8 overlooked some precedents that indicated that the
9 plaintiff did not have standing to make that argument.
10 That's all we needed to move for reconsideration because we
11 prevailed on the diminution-in-value argument. And what I
12 mean by we prevailed on that is that when the Court granted
13 the motion dismissing the claims for bad faith, that, as a
14 matter of law and that by virtue of the complaint the
15 plaintiff had filed, dismissed the claims for diminution of
16 value.

17 And specifically, what I mean by that, referring to
18 the complaint, there are about five or six paragraphs where
19 the plaintiffs say they seek diminution of value for our
20 bad faith. The paragraphs are 64 and 65, 110 and 111 and
21 113. In all of those paragraphs of the complaint, the
22 plaintiff's basis for loss of -- for diminution of value
23 was bad faith.

24 Therefore, when the Court dismissed the bad-faith
25 claim, the Court dismissed the claim that gave rise to the

1 diminution of value. And we submit your Honor was correct
2 when you dismissed the loss -- the bad-faith claim.

3 We have 30 years of precedent in the Third Circuit,
4 that's the Polito case, 20 years of precedent in the state
5 Supreme Court, where the Court has said -- both courts have
6 said under New Jersey law, once the claim for bad faith is
7 dismissed, therefore, the claim for consequential damages
8 fails as a matter of law.

9 So, the reason I started by saying it is the
10 plaintiffs who are seeking reconsideration at this time, we
11 won. When the Court dismissed the bad-faith claim, it
12 dismissed the basis for the damage claim that we're talking
13 about today.

14 The plaintiffs now are saying to the Court, yes, you
15 dismissed the bad-faith claim but we can get consequential
16 damages despite the fact that you dismissed the claim that
17 forms the basis for the consequential damages.

18 So, I agree with Mr. Hayes, we did not move for
19 reconsideration on the bad-faith ruling because we won. I
20 can't imagine how we would come in and say you should
21 reconsider that. And once your Honor dismissed the bad-
22 faith claim, all of the other claims failed because that's
23 what they pled in their fourth amended complaint, and all
24 the other claims failed under the Third Circuit and New
25 Jersey Supreme Court precedent.

1 THE COURT: All right. Thank you, Mr. Kott. Mr.
2 Stone, go ahead.

3 MR. STONE: Thank you, Judge. Let me translate that
4 into English, your Honor. They are too late. They didn't
5 move for reconsideration. They admit they didn't move for
6 reconsideration.

7 They're trying to say that your Honor's decision,
8 which specifically says that we can pursue loss of
9 diminution of value, which the decision says is based on
10 compensatory damages, it does not say it is based on
11 consequential damages. It does not say it is based upon
12 bad faith.

13 Your decision cites to compensatory damages and the
14 definition of compensatory damages in contract in New
15 Jersey, which is dealing with a case with over 200 title
16 closing letters and policies where the title insurance
17 company agents were actually allegedly involved in and
18 facilitated the fraud, and your Honor correctly held that
19 under that rather unique set of facts, the definition of
20 compensatory damages, which is what your Honor says in your
21 opinion, includes and subsumes that a jury could find as a
22 matter of fact that these title insurance companies, having
23 issued over 200 of these insurance policies to one lender,
24 would understand when they failed to pay on any of them,
25 that that would cause tremendous financial loss to the

1 lender.

2 I'd also point out that the case that they rely on --
3 well, actually, they rely on in their brief, Pickett, your
4 Honor, which is a Supreme Court of New Jersey case from
5 1992, it actually cites the same language, your Honor. It
6 says, on page nine of that opinion, it says, "Under
7 contract law, a party who breaches a contract is liable for
8 all of the natural and probable consequences of the breach
9 of that contract. Compensatory damages are designed to put
10 the injured party in as good a position as he would have
11 had if performance had been rendered as promised," and it
12 cites a number of cases. So, that is compensatory damages.

13 This constant reference to consequential damages I
14 think is a straw man. It's not a point. The point is that
15 your Honor ruled in your opinion that we could -- a jury
16 could find that we could get this as compensatory damages.
17 That was accurate. They never moved to reconsider it and
18 they don't have the ability to move to reconsider it now.
19 And they admit now that even though they didn't have a
20 motion to reconsider it, that that's what they're doing.

21 Secondly, we did in our pleadings, in our motion
22 for -- I'm sorry -- in our amended complaint, our fourth
23 amended complaint, paragraphs 92 through 100 are breach-of-
24 contract allegations, they are not bad-faith allegations,
25 and we do seek within that diminution of value.

1 So, it's untrue that in our pleadings we did not put
2 them on notice that we're seeking diminution of value based
3 on breach of contract.

4 We also told them that in our answers to
5 interrogatories and in all the various mediations --
6 worthless mediations that we've been going through for
7 years with these people. So, the idea that they were not
8 noticed that we were seeking that is completely wrong.

9 Finally, they take out-of-context statements from
10 briefs we have where we were arguing bad faith because bad
11 faith was one of the claims we had in the case, but simply
12 because we, in briefs at certain points, say that we get
13 certain damages as a result of bad faith does not mean that
14 that somehow changed the law in New Jersey or affects your
15 Honor's opinion.

16 Your Honor's opinion was that we were entitled to
17 seek these damages. They never sought to reconsider it.
18 They're too late now and the opinion is correct.

19 So, for all those reasons, we believe your Honor
20 should grant our motion and make it clear that we do have a
21 right to seek those damages at this point.

22 THE COURT: All right. Thank you very much.

23 MR. HAYES: Very briefly, your Honor. Your Honor,
24 the size of the case, the size of the fraud, the number of
25 transactions is really irrelevant for purposes of

1 determining what New Jersey law provides. And the fact
2 that the plaintiff may say that it's entitled to
3 consequential damages under a breach-of-contract theory
4 doesn't change the law that it's not.

5 Compensatory damages are the benefit-of-the-bargain
6 damages and New Jersey cases say that's the debt plus
7 interest. Consequential damages are separate damages which
8 flow from the wrong, assuming they are foreseeable.

9 Your Honor's already concluded that these damages
10 might very well have been foreseeable, but they're not the
11 debt and the interest in this case. They are separate
12 damages which the plaintiff claims arose from the wrongful
13 conduct.

14 We believe we framed the issue for your Honor
15 correctly and, that is, if this is not debt plus interest,
16 which it is not, if these are consequential damages,
17 they're simply not recoverable in a breach-of-contract
18 claim under New Jersey law. They're only recoverable in a
19 bad-faith claim, which your Honor has already ruled does
20 not exist in this case. Thank you, sir.

21 THE COURT: All right. Thank you very much.

22 MR. STONE: How many lawyers do they get?

23 THE COURT: This seems to be endless. Why are we
24 coming back again?

25 MR. KOTT: Could I just have one brief point, your

1 Honor?

2 THE COURT: All right. Seems to me you've had your
3 turn.

4 MR. KOTT: I want to respond to something Mr. Stone
5 said.

6 THE COURT: Go ahead and respond, and they can
7 respond to your response.

8 MR. KOTT: What I wanted to say is that what we're
9 talking about, their claim, is consequential damages, not
10 compensatory, and their claim for consequential damages
11 arises from our alleged bad faith of not paying the claims
12 in a timely fashion.

13 And when you look at their complaint, particularly
14 paragraphs 64 and 65, they couldn't be clearer that what
15 they're pleading for is consequential damages for our
16 failure to pay the claim in a timely fashion.

17 THE COURT: All right. Did that inspire you, Mr.
18 Stone?

19 MR. STONE: I'll rest.

20 THE COURT: All right. Well, I'll reserve decision
21 and let you know. Thanks very much.

22 (Whereupon the proceedings are adjourned.)
23
24
25